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No. 88-1186

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CUDAHY COMPANY and GENERAL HOST CORPORATION,
Petitioners,

v.

CECIL W. MILLER, *et al.*,
– Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 1500—North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

February 17, 1989

CLIFTON S. ELGARTEN *
VICTOR E. SCHWARTZ
LIBERTY MAHSHIGIAN
SCOTT L. WINKELMAN
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2523
Attorneys for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 36 of the Rules of this Court, the National Association of Manufacturers of the United States of America ("NAM") requests leave to file the accompanying brief as *amicus curiae* in support of the petition for writ of certiorari.

NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

As the representative of American manufacturing concerns, NAM has a vital interest in ensuring that there is rationality and fairness in the rendering of damage awards in tort cases. Both punitive damages and com-

pensatory damages should be measured by standards that are economically reasonable, responsible and consistent with fundamental understandings of economic value. At a minimum, there should be some standards. Absent reference to reasonable standards to govern tort awards, American businesses are potentially subjected to irrational awards that may threaten their ability to compete effectively in international markets, or, in extreme cases, merely to survive in American markets.

The compensatory and punitive damages awards assessed in this case exemplify the type of novel and excessive tort damages awards that can result absent limitations and standards to assure (1) that compensatory damages awards approximate actual losses incurred by plaintiffs, and (2) that punitive damages awards bear some relationship to the gravity of the wrong committed.

Accordingly, as the principal voice of United States manufacturing businesses, NAM seeks to submit this *amicus curiae* brief in support of the petition for a writ of certiorari in order to identify the constitutional restraints on compensatory and punitive damages awards in tort cases and to stress the importance of resolving these issues in this Court. NAM respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* be granted for these purposes.

Respectfully submitted,

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 1500—North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

CLIFTON S. ELGARTEN *
VICTOR E. SCHWARTZ
LIBERTY MAHSHIGIAN
SCOTT L. WINKELMAN
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2523
Attorneys for Amicus Curiae

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* Counsel of Record

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BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

NAM has a strong interest in ensuring that compensatory and punitive damages in tort lawsuits are measured responsibly and rationally. The rate of increase in tort litigation is the topic of much debate in courts, legislatures and the media. For example, in connection with product liability litigation, objective empirical data show

that since 1980 there has been a dramatic increase in the size of damages awards. *See* D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 16-18 (1987) ("the median for product cases has risen very sharply" and "in the case of high-stakes suits such as product liability and malpractice, the growth in the average award has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent").

The "explosion" in damages awards has created a climate of uncertainty for United States manufacturers. In some cases, it has caused manufacturers to stop producing socially useful and lifesaving products such as vaccines against childhood diseases. *See* H.R. Rep. No. 908, 99th Cong., 2d Sess., pt. 1, at 4-7 (1986); *see also* Schwartz & Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 Ohio St. L. J. 387 (1987). Manufacturers have decided against introducing new and socially desirable products because of liability fears. *See* E.P. McGuire, *The Impact of Product Liability* vii (1988); *Insurance Costs Deter AIDS Vaccine*, 1 Liab. & Ins. Bull. (BNA), at 5 (Nov. 3, 1986) ("[T]his general climate of uncertainty is something that deters many pharmaceutical companies from being involved in AIDS vaccine research.") In a far greater number of cases, the need to anticipate and fund potential litigation and potentially extreme damages awards (or simply to pay insurance premiums in anticipation of such awards) is a major disadvantage for American businesses in their attempt to compete with foreign businesses. *See* H.R. Rep. No. 748, 100th Cong., 2d Sess., pt. 1, at 23-24 (1988) ("Without having to absorb the costs of product liability exposure for most of their sales, foreign corporations have an obvious price advantage. In Japan and Europe, product liability laws are more stable, litigation less frequent, and large damage awards uncommon").

It is NAM's view that extreme and irrational compensatory and punitive damages awards result from the failure of the courts and the legislatures to enunciate responsible standards for measuring such damages. At a minimum, the Constitution requires that standards be set before excessive damages awards may be levied.

STATEMENT

This case arises out of a civil action for damage to real property brought by respondents who are owners and lessees of farm land located near a plant operated by the American Salt Company, an operating division of petitioner Cudahy Company. Respondents have claimed that American Salt Company's salt mining operations polluted a natural aquifer underlying their property and made their property unfit for agricultural irrigation.

Respondents sought compensatory damages in the amount of $1.26 million, a figure based on the $450 dollars per acre difference in the local fair market price per acre of irrigable land ($1,100 per acre) and the local fair market price per acre of dry land ($650 per acre). Complaint ¶ 10. The district court, following a bench trial, awarded respondents $3.06 million in "temporary damages" for lost crop profits for the period 1975-1983 and $10 million in punitive damages. 592 F.Supp. 976, 1006 (D. Kan. 1984).[1]

Petitioners appealed. Petitioners argued that the punitive damages award violated the Eighth and Fourteenth

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[1] The $10 million punitive damages award was held in abeyance pending the district court's evaluation and assessment of petitioners' cleanup efforts. The court retained jurisdiction to reduce the punitive award if petitioners proposed and implemented a feasible cleanup plan. 592 F. Supp at 1007-09. The district court ultimately rejected all proposals submitted and ordered petitioners to pay the $10 million punitive damages award together with interest from the initial date of judgment. 656 F. Supp. 316, 351-57 (D. Kan. 1987).

Amendments to the United States Constitution. App. at 19. The United States Court of Appeals for the Tenth Circuit affirmed. 858 F.2d 1449 (1988). On petition for rehearing, petitioners attacked the compensatory damages award, as explained by the Court of Appeals, as violative of the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments because the award exceeded the reduction in value of the property that had been damaged. *See* Petition for Rehearing and Suggestion of Rehearing En Banc at 8, *Miller v. Cudahy Company*, No. 87-1502 (October 21, 1988). The Court of Appeals denied the petition for rehearing and the petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. STANDARDLESS AWARDS OF PUNITIVE DAMAGES ARE INCONSISTENT WITH THE CONSTITUTION.

The Court now has before it the case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, which presents the question whether the Excessive Fines Clause of the Eighth Amendment requires that punitive damages be set, not through the unrestrained exercise of discretion, but by reference to articulated standards and consistent with the principle of proportionality. There must be some articulated basis for measuring the *amount* of a punitive damages award in order to ensure some degree of rationality in the process of setting damages. And, consistent with the Constitution, there must be a relationship between the gravity of the wrongdoing and the punitive damages that are imposed.

This case presents an issue nearly identical to that raised in *Browning-Ferris*. The $10 million punitive damages judgment imposed by the district court was totally out of proportion to the wrongfulness of petitioners' conduct and was not subject to any previously ar-

ticulated (or presently articulable) standard for determining the appropriate amount of the award. At a minimum, this case should be held for the disposition of *Browning-Ferris*, and remanded to the Court of Appeals for further proceedings consistent with the disposition of that case.

This case also raises additional, substantial constitutional questions regarding the measure of compensatory and punitive damages not presented by *Browning-Ferris*. Therefore, even if the Court's disposition of *Browning-Ferris* does not alone require this case to be reversed and remanded, the questions presented in this case regarding the Due Process and Takings Clauses warrant a grant of certiorari. The significance of these issues is reflected by the grant of certiorari in *Browning-Ferris*. The question whether the Constitution imposes constraints on the standardless or irrational assessment of damages is important in a practical sense whether the source of the constraint is the Due Process Clause or the Excessive Fines Clause of the Eighth Amendment. The substantiality of the questions in a legal sense is demonstrated below.

Amicus notes that the Court already has before it at least one other petition in which the due process issues raised by standardless punitive damages awards have been properly raised. *The Goodyear Tire & Rubber Company v. Hodder*, No. 88-626. *Amicus* also joined in an *amicus* brief in support of that petition.

A. This Court Should Consider Whether a Standardless Award of Punitive Damages Violates the Due Process Clause.

The imposition of a $10 million punitive damages award in this case violates the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.[2] It is important to note that this $10 mil-

[2] We refer to the Fifth, as well as to the Fourteenth Amendment, because while the law being applied by the court below was state

lion punitive award was rendered in the context of damage to property, not to a sympathetic, seriously injured victim: hence, the award is not some aberration that can be discounted as the product of "jury prejudice." It is of equal significance that this occurred in a case tried to a judge, not a jury; indeed, the judge's reasons for rendering a punitive damages award here reflected only his own idiosyncratic view of appropriate punishment. He could not reference any established standard for measuring a punitive damages award (apart from an incorrect reference to petitioners' net worth), and he did not attempt to test his award against comparable awards in any similar action.

These aspects of the case demonstrate that the imposition of punitive damages, where the government has *not* enunciated clear standards or established articulable points of reference, is totally unbridled, even under the best of circumstances, and inevitably leads to extreme and anomalous results. Rationality is foreclosed because state "law" on punitive damages, which the district court attempted to apply in this case (and the United States Court of Appeals for the Tenth Circuit attempted to be faithful to), is simply a will-o'-the-wisp: it appears to exist, but in practical application, it is a phantom.

Under the English system of our forebears and our American system of justice, we are accustomed to justice measured by articulable legal standards. Punitive damages is an extraordinary exception to this basic premise of our legal system. The facts of this case, as petitioners' brief shows, present a paradigm of standardlessness.

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law, the court applying that law, and whose authority stands behind the judgment, is a federal court.

1. *The Due Process Clause Requires that State Law Clearly Define the Offense; It Did Not in this Case.*

The prevailing process of imposing punitive damages, whether by judge or jury, violates due process because it is bereft of meaningful standards defining the circumstances under which an award of damages *shall* be rendered. A hallmark of due process is that "laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of specificity in legal standards is most crucial in areas where courts and other government offices exercise great discretion. *Cf. Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (enhanced procedural safeguards are required where factfinder possesses "unusual discretion" to weight facts and reach dispositive determinations). Moreover, the Court has long recognized that problems of Constitutional moment are raised by "fines . . . [that] are so grossly excessive as to amount to a deprivation of property without due process of law," *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), and that due process "places a limitation upon the power of the states to prescribe [civil] penalties . . . [which are] wholly disproportionate to the offense and obviously unreasonable." *St. Louis, I. M. & S. Ry. v. Williams*, 251 U.S. 63, 66-67 (1919).

In most jurisdictions, a judge or a jury considering whether to impose punitive damages is guided by no more than vague, nondescriptive rhetoric. In the instant case the district court, in order to award punitive damages under Kansas law, had to find that the petitioners engaged in "fraud," "malice," "gross negligence," or "oppression." 592 F.Supp. at 1006. In other situations, state laws speak of "willful or wanton misconduct,"[3] "reck-

[3] *See, e.g., Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887 (Del. 1983).

less disregard,"[4] "gross negligence,"[5] or "rudeness" or mere "caprice."[6] In that regard, it is imperative to appreciate that even when the vague "standards" allowing a punitive award are deemed by a jury or court to have been met, Kansas law and the "law" of other states simply provide that punitive damages *may* be imposed. Once again, there are *no* standards or *rules* that indicate when this "may" becomes "should." This explains why, on another day, another court *may* have imposed *no* punitive damages for precisely the same conduct. Still another court might have said $300,000, another $500,000, or another $20,000,000 in punitive damages. No court would be "right" and no court would be "wrong," for there are *no* measures of right or wrong under the process by which punitive damages are imposed in the State of Kansas and in many other states.

Due process requires more. Whether the defendant is an individual, a corporation, a partnership or group, he or she is entitled to a clear standard, indicating what type of conduct will result in what is, in its practical implications, a penal sanction.[7] In the instant case, the

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[4] *See, e.g.*, Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1988).

[5] *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (Vernon 1987).

[6] *See Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976).

[7] Under the law of torts, and by any reasonable definition, punitive damages are penal in nature. *See* W. Prosser & W.P. Keeton, *The Law of Torts* § 2 at 9 (5th ed. 1984) ("Such damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example"); C. McCormick, *Handbook on the Law of Damages* § 77 at 275 (1935) ("Exemplary damages are assessed for the avowed purpose of visiting a punishment upon the defendant and not as a measure of any loss or detriment of the plaintiff"); D. Dobbs, *Handbook on the Law of Remedies* § 3.9 at 204 (1973) ("Punitive damages are sums awarded, usually as

vagueness of the standard and confusion in its execution appear to have resulted in a sanction imposed against the petitioners for conduct that occurred even before they acquired a particular property. *See* Pet. Br. at 11 n.14. Due process requires that punishment be imposed for wrongful conduct engaged in by the defendant itself; due process also requires that the circumstances giving rise to punishment be defined with clarity.

2. *Due Process Requires Articulated, Ascertainable Standards and Boundaries as the Precondition for Imposition of Punitive Damages.*

Beyond the relative standardlessness with respect to liability, punitive damages are routinely awarded without reference to any standard whatsoever for measuring their quantum. As the instant case reflects, such awards are not cabined by minimum nor maximum penalties. Indeed, the passages below constitute the entirety of the district court's findings of fact and conclusions of law relative to the appropriate *amount* of punitive damages to be imposed in this case:

> The Court finds that any award of punitive damages . . . must be determined with due regard to the net worth of the defendants . . . In view of the considerable financial resources controlled by General Host and its net assets of over $450,000,000, the Court finds that an appropriate punitive damage award would amount to $10,000,000. . . .

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punishment or deterrent levied because of particularly aggravated misconduct on the part of the defendant"); W. Prosser, J. Wade & V. Schwartz, *Torts: Cases and Materials* ch. 10 at 528-29 (8th ed. 1988) ("awarded to [plaintiff] for the purpose of punishing the defendant, of admonishing him not to do it again, and of deterring others from following his example"); M. Franklin & R. Rabin, *Tort Law and Alternatives: Cases and Materials* ch. 11 at 622 (4th ed. 1987) ("awarded to punish the defendant or to make an example of that defendant so that others will avoid this very serious kind of misconduct").

> The Court concludes that the facts and circumstances of this case are such that the Court should exercise its discretion to find the defendants liable to the plaintiffs for punitive damages, in the amount of $10,000,000.

592 F. Supp. at 998, 1007.

The court cited to no established principles which link punitive damages to the "net assets" of the wrongdoer.[8] Nor did it suggest any guidelines which in any way constrained or directed the "exercise [of] its discretion." The implication could not be more clear: a federal judge did what he "felt" was right. The award was then reviewed by a distinguished appellate court, which apparently did what it "felt" best. Nevertheless, no law was ever applied, because there was no law to apply. As a result, petitioners' brief reveals, punitive damages were imposed totally out of proportion to the wrongfulness of petitioners' conduct. *See* Pet. Br. at 13. The essence of the problem posed by this and most other punitive damages schemes as currently constructed is that courts are compelled to operate almost totally by "feel," rather than by rules.

As our criminal law clearly reflects, punishments should be bounded by minimums and maximums. It is clear, in this regard, that the imposition of punitive damages differs little from a criminal fine in terms of its impact. A sanction of this type imposes a harsh stigma; its imposition clearly has an economic impact. Unless punitive damages are confined within a rational and reasonable range, their award predictably turns out, as in this case, to be "wholly disproportionate to the offense." *Williams*, 251 U.S. at 67. Hence imposition of such

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[8] Nor, as petitioners point out, did the court even apply appropriately its *own* standard for punitive damages awards. In fact, petitioner General Host's *total* assets for the period in question were about $450 million; its "net assets" were $147 million. Pet. Br. at 6 n.8.

awards, without regard to specific standards, violates any principled understanding of the term "due process."

Irrespective of the result in *Browning-Ferris*, this Court should review this case (or one of the other cases that squarely raise the question of the due process limitations applicable to punitive damages awards) and hold that, at a minimum, due process requires rational, reasonable and previously articulated standards, or boundaries, for determining what conduct will give rise to punitive awards and how those awards shall be measured. If due process does not carry such import, it carries little import at all. The instant case, devoid of any apparent prejudice in the courts below, manifests clearly the need for the development of standards for the imposition of this type of punishment; on the basis of the trial court's decision, this case is especially appropriate for review.

B. This Court Should Consider Whether the Award of Punitive Damages in this Case Violates the Excessive Fines Clause.

For the reasons set forth in the brief of petitioners and supporting *amici* in *Browning-Ferris*, the nature of punitive damages requires that they be subject to the protections afforded by the Eighth Amendment's Excessive Fines Clause. At a minimum, such protections include (1) clearly defined standards of wrongful conduct that must be proven before punishment can be imposed, (2) fixed limits or clear guidelines by which the trier of fact might assess the amount of punishment to impose, and (3) objective standards for judicial review of the propriety of punitive damages awards. Absent some such standards to guide decisionmakers, the chance of achieving proportionality in such awards is merely that—a random chance. Awards rendered in the absence of standards are inherently suspect and should, at a minimum, be subjected to heightened judicial scrutiny for proportionality.

1. *The Excessive Fines Clause is Violated Where Punitive Damages are Imposed Without Clearly Defined Standards.*

As discussed above, the States employ vague, differing and often unintelligible standards to define the type of wrongful conduct that will render a defendant subject to punitive damages penalties. An award of punitive damages in such circumstances, as occurred in this case, is "excessive" under tests applied by this Court for evaluating whether a punishment violates the Excessive Fines Clause of the Eighth Amendment.

Of principal import, a "punishment is excessive . . . if it is unnecessary." *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring). A punitive damages award imposed without clearly defined standards violates this test because it fails to serve a valid state interest. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("states have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury.") No valid state interests are served in such cases because standardless punitive damages awards fail to accomplish the deterrence and retributive goals furthered by such damages. Deterrence can occur only if persons to be deterred are informed in advance of the type of conduct that will result in punishment and the magnitude of sanctions that will be inflicted for that conduct. Proper retribution can occur only if the sanction is proportionate to the gravity of the misconduct.

2. *The Excessive Fines Clause Is Violated Where Punitive Damages are Imposed Without Clear Guidelines for the Trier of Fact to Apply in Determining the Amount of Punishment to Inflict.*

This Court has held that the Eighth Amendment requires that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted."

Solem v. Helm, 463 U.S. 277, 290 (1983). This Court has also noted that the Eighth Amendment "imposes 'parallel limitations' on bail, fines, and other punishments." *Id.* at 289, *quoting Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

Where a trier of fact is given no fixed limits or clear guidelines for calculating a proper punishment, any relationship between the punitive award in one case, and the punitive award for the same or different conduct in another case, is merely coincidental. Yet the concept of proportionality demands at least some common points of reference, or attempts at comparison, so that a scale of measurement—indeed, of proportion—might be derived. Where the whim of the individual factfinder is the only standard, it is simply impossible and unreasonable to expect proportionality to be achieved.

Thus, this case suffers from precisely the same Eighth Amendment defects isolated in *Browing-Ferris*. Reversal in that case demands reversal here.

II. KANSAS' COMPENSATORY DAMAGES RULE, AS APPLIED IN THIS CASE, DEPRIVES PETITIONERS OF DUE PROCESS AND CONFLICTS WITH ESTABLISHED PRINCIPLES OF TAKINGS JURISPRUDENCE.

This case features the unusual situation in which a compensatory damages rule conflicts with constitutional principles. *Amicus* recognizes, of course, that to a great extent, damages rules may be devised by the States, and applied by the courts, without fear of trammeling upon constitutional interests. Nonetheless, a rule of law that, both by its terms and as applied in this case, purports to measure "compensation" for a temporary and partial destruction of property with a figure far in excess of the actual total value of the property, and purports to provide for continuing damages over time, cannot fairly be characterized as providing mere compensation. Nor

does such a rule serve any legitimate government purpose. This Court should grant petitioners' petition for a writ of certiorari to decide the important and admittedly novel question whether, and at what point, a state compensatory damages rule such as that applied to petitioners veers so far from the underlying goal of compensation and economic rationality as to run afoul of basic principles of due process and common understandings about the value of land implicit in the Takings Clause.[9]

A cornerstone of due process jurisprudence is that government action must, at bottom, rest upon a modicum of reasonableness, *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (due process requires that regulated rates fall within a "zone of reasonableness"), and "fundamental fairness," *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). Thus, this Court recently reiterated that due process is violated by government action which is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the [government] is free to adopt." *Pennell v. City of San Jose*, 108 S.Ct. 849, 857 (1988) (in context of price controls) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1983), quoting *Nebbia v. New York*, 291 U.S. 502, 539 (1934)); *see also Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citations omitted) (due process "protect[s] . . . against arbitrary action of government"). A related and equally fundamental limitation on government action is imposed by the Takings Clause, which, in the oft-quoted words of Justice Holmes, provides that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). *See also First English Evangelical Lutheran Church of Glendale*

[9] The principles informing the Takings Clause have been extended to the states through the Due Process Clause of the Fourteenth Amendment. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231, 244 n.7 (1984).

v. Los Angeles, 107 S.Ct. 2378, 2386 (1987) (same).[10] The premises of takings analysis provide one further insight: The historic remedy for a taking of land is compensation for the *value* taken. Kansas' compensatory damages rule, as applied in this case, offends established standards of due process as well as fundamental principles underlying takings jurisprudence.

The award of compensatory damages in this case, imposed to compensate for an injury to property, in fact exceeds by multiples the total value of the property itself and, certainly, the diminution of value to that property.[11] Moreover, the award is *perpetual*. Respondents may continuously return to the court for additional damages, again deemed "compensatory," and again in amounts above and beyond any fair valuation of the property. This perverse result cannot be reconciled with the underlying purpose of compensatory damages, which, by definition, is to *compensate* for injury suffered. It is axiomatic that the goal of compensation is fully realized in the context of property damage when the wronged party is awarded the full value of the land itself. *See* Restate-

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[10] In recent rulings, the Court has at times refrained from distinguishing between the Due Process and Takings Clauses in articulating constitutional restraints on government action. *See, e.g., FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) (citing "traditional Fifth Amendment standards"); *FPC v. Texaco Inc.*, 417 U.S. 380, 391-92 (1974) (applying "constitutional" limitations); *but cf. Pennell, supra* (considering each provision separately). The Court has repeatedly emphasized, moreover, that takings analysis rests not on generally applicable black-letter principles, but rather on "essentially ad hoc, factual inquiries." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see also Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) ("[t]here is no set formula to determine where regulation ends and taking begins").

[11] There appears to be no dispute that the "temporary damages" awarded to respondents far exceed the diminished market value of the land and the amount of permanent damages thereto. *See* Pet. Br. at 6 n.7.

ment (First) of Torts § 931 comment a (1939) ("A person whose land has been damaged is entitled to compensation for the difference between its value before and after the harm"); *cf.* M. Friedman, *Contracts and Conveyances of Real Property* 914 (4th ed. 1984) (seller's damages for buyer's breach of agreement to sell land is "measured by the difference between the purchase price and the market value of the property"); 11 S. Williston, *Contracts* § 1399 (3d ed. 1968); 77 Am. Jur. 2D *Vendor and Purchaser* § 489 (1975) (same).[12]

It is the continuing aspect of respondents' award that, for constitutional purposes, is its principal undoing. Kansas might well justify a compensatory award for *past* injury as reflecting the actual economic losses suffered by respondents prior to the litigation. But the *future* element of the instant award—under which respondents can bring suit every two years to recover additional damages for the same injury to the same land—can only be understood as effecting a continuing subsidy of respondents' future operations.

Consistent with basic principles of economics and property law, a company in the position of petitioners has historically been able to avoid damages laibility for the destruction of some other private owner's land simply by purchasing that land (or an easement in that land) at its fair market value. *Cf. supra* (citing authorities on valuation of property). Under the Kansas damage law applied below, however, it is far more advantageous to the respondents to remain on the land indefinitely, *and to continue to suffer the injury for which*

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[12] So embedded is this principle of property valuation that the proper measure of damages for the government's taking of property is its "market value at the time of the taking." P. Freund, *Constitutional Law* 1102 (1977) (recognizing this as an "elementary principle").

they can collect damages,[13] than simply to sell the land at either its current market price or at the market price it would have commanded if the injury had never occurred. Even though elementary economics and principles of property law suggest that a sale of the land would be the most efficient and appropriate result,[14] under the court's award one can expect that no sale of the property will ever occur. By employing the biennial damages calculation to tax petitioners with the continuing losses that respondents are imposing upon themselves by continuing to use the land, respondents can realize a total recovery many times greater than their present injury, a recovery far out of proportion to the value of the property said to have been destroyed.

A continuing damages remedy of this kind, in this context, amounts to nothing less than a continuing subsidy of respondents' activities, the *entire* burden of which is borne, privately, by petitioners. Such a subsidy cannot be squared with the Fifth and Fourteenth Amendments. *See First English Evangelical*, 107 S.Ct. at 2388 (Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Hawaii Housing Authority*, 467 U.S. at 241. Such a damages scheme also violates the axiomatic tenet, central to all takings jurisprudence, that govern-

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[13] As petitioners note, the injury to the land in question likely will not be abated for more than a century. *See* Pet. Br. at 5, 18-19. The Court of Appeals acknowledged the uncertainty posed by the lower court's award, observing that "no conclusive time frame for the cleansing of the aquifer has been established. . . ." 858 F.2d at 1455.

[14] In effect, an award of damages measured by the diminution in the value of the property on account of the nuisance reflects the fair market value for an easement to permit the continued intrusion on the land.

ment cannot "take property from A and give it to B." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). Kansas' damages rule works precisely this result, constituting as it does little more than a substantial reallocation of private resources from one category of landowners to another, encompassing amounts beyond the conceded economic *value* of the property being damaged.

That Kansas has imposed this redistributive subsidy under the guise of a common law damages award, rather than through legislation, cannot be understood to immunize the effects of such action from constitutional scrutiny. Takings analysis turns not on the source of government action—whether it be a legislature, a zoning board, a rent control or planning commission, or, as in this case, a court's application of aberrational damages theories—but rather on its purposes and overall impact. *Cf. FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("It is not the theory but the impact of the rate order which counts" for purposes of taking analysis).[15] Here, the financial impact on petitioners of Kansas' property damage laws is not only staggering, but is grossly disproportionate to the undisputed value of the property at issue. And whereas under any rational economic analysis a landowner who is found liable for value to adjoining property can avoid future injury by purchasing the property at fair market value, that cannot occur here. Instead, it is the producer that must shut down *its* business to abate the nuisance. This is government action in its most capricious form, action whose severity and capriciousness will continue to grow over time as

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[15] That takings jurisprudence does not discriminate based on the locus of government action is apparent from the wide variety of governmental bodies whose actions have come under its scrutiny. *E.g., First English Evangelical, supra* (county ordinance); *Penn Central, supra* (denial by zoning commission of approval to make exterior alterations on historical landmark); *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987) (permitting scheme of a state coastal commission).

respondents return to court at two-year intervals to seek still further "compensatory" damages awards for continuing (albeit "temporary") damage to their property.[16]

This nation's historical understandings of economic value are nowhere more firmly established than in the realm of real property. Our measures of the value of real property are timeworn and firmly rooted in our jurisprudence. Thus, in measuring compensation for damages to real property, courts must be cautious lest they lose sight of our historical frame of reference—*i.e.*, the measure of injury to real property must, at some core level, bear some direct relationship to the value of the property destroyed.

The profound threat and uncertainty presented manufacturers and mining interests by a damages theory allowing for perpetual subsidy of uncertain magnitude is apparent. The Court should grant certiorari to decide the fundamental question whether, and to what extent, such perpetual damage rules for injury to property are circumscribed by the Fourteenth Amendment.

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[16] As noted in petitioners' brief, respondents have already initiated their quest for additional relief, having filed two additional suits seeking, *inter alia*, $2 million in compensatory damages annually for each two-year period. Pet. Br. at 5 n.6, 19.

CONCLUSION

This case suffers from the same flaws with respect to the punitive damages award as does *Browning-Ferris*, now pending on writ of certiorari. In addition, it presents issues regarding Fifth and Fourteenth Amendment limitations on awards of punitive damages and compensatory damages for injuries to real property, that independently warrant issuance of a writ of certiorari in this case.

Respectfully submitted,

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 1500—North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

CLIFTON S. ELGARTEN *
VICTOR E. SCHWARTZ
LIBERTY MAHSHIGIAN
SCOTT L. WINKELMAN
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2523
Attorneys for Amicus Curiae

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* Counsel of Record